

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DARRELL HEMPHILL,)
Petitioner,)
v.) No. 20-637
NEW YORK,)
Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (10:55 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Hemphill versus New York.

5 Mr. Fisher.

6 ORAL ARGUMENT OF JEFFREY L. FISHER

7 ON BEHALF OF THE PETITIONER

8 MR. FISHER: Mr. Chief Justice, and
9 may it please the Court:

10 A defendant cannot lose his right
11 under the Confrontation Clause to exclude
12 testimonial hearsay simply by making a
13 legitimate defense based on admissible evidence,
14 and that is true even if the hearsay the
15 prosecution would like to introduce would
16 supposedly contradict that defense. To the
17 contrary, history and experience tell us that is
18 when the clause's guarantee of cross-examination
19 is at its most urgent.

20 The state never directly disputes the
21 legal propositions I just advanced. Instead, in
22 the state's red brief, it advances for the first
23 time a new argument never before made in this
24 case. According to the state's new theory, Mr.
25 Hemphill forfeited his confrontation rights

1 because he made supposedly improper arguments at
2 trial.

3 And apart from this new theory's
4 eleventh-hour appearance, there are two major
5 problems. First, it finds no support in the
6 record. The joint appendix is crystal-clear
7 that the reason why the trial court admitted
8 Morris's allocution was because Mr. Hemphill
9 claimed Mr. Morris was the shooter. He advanced
10 a third-party defense. And the state again and
11 again asked to introduce Mr. Morris's allocution
12 to refute that defense.

13 And I'll turn the Court to Joint
14 Appendix page 185, which is where, at the top of
15 that page, the trial court summarizes its
16 ruling. It says the defense's argument is in --
17 "in all respects is appropriate and, under the
18 circumstances of this case, probably a necessary
19 argument to make." But then the trial court
20 says, "Nonetheless, that argument opens the door
21 to evidence offered by the state refuting the
22 claim that Morris was, in fact, the shooter."

23 The second problem with the state's
24 new theory is that it finds no support in New
25 York law either. New York's "opening a door"

1 theory has no impropriety requirement. Instead,
2 all it requires is the evidence the prosecution
3 seeks to introduce to be in conflict or
4 contradiction to the defense -- defense's own
5 evidence or the defense's arguments.

6 And that's why the state itself
7 admitted at page 4 and 5 of its brief in
8 opposition -- I'm sorry, of its brief in
9 opposition in this Court, just like throughout
10 the state courts, that the reason why Morris's
11 allocution was admitted was because it
12 contradicted the defense, not because of any
13 supposed impropriety.

14 So, at bottom, what you have in front
15 of you today is a state law rule in a holding
16 under Reid, the New York court of appeals
17 decision that says that a legitimate defense
18 based on admissible evidence can forfeit the
19 Confrontation Clause.

20 That rule flouts the history, purpose,
21 and experience of the Confrontation Clause. I'm
22 happy to entertain the Court's questions, but I
23 will -- otherwise I turn first to history.

24 JUSTICE THOMAS: A couple of quick
25 questions, Mr. Fisher.

1 The -- I mean, you point to the
2 state's eleventh-hour change in arguments, but I
3 think we -- you have some eleventh-hour changes
4 too, it appears.

5 Did you focus on the constitutionality
6 of Reid? Below, it seemed as though you were
7 challenging the application of Reid and did not
8 assume that even if Reid were properly applied
9 that you would have a Confrontation Clause
10 problem.

11 MR. FISHER: Justice Thomas, we made
12 -- we made a Sixth Amendment argument all the
13 way through the case, including challenging the
14 state's argument that Reid dictated a forfeiture
15 of the right here. And the place that it's most
16 directly made is at pages 386 and 388 of the
17 Joint Appendix. That's our brief to the New
18 York court of appeals.

19 And, there, we said -- and this is on
20 page 388. We said that if Reid is construed to
21 mean that simply rendering testimonial evidence
22 relevant because it would dispute the defense
23 case, then Reid cannot be squared with the Sixth
24 Amendment and has to be wrong.

25 And so we said quite directly to the

1 New York court of appeals exactly what we're
2 saying here, is that a -- a rule of opening the
3 door that depends on expanded relevance cannot
4 be squared with the Confrontation Clause.

5 That's the core of the argument we're making
6 with -- in front of you here today. I think --

7 JUSTICE SOTOMAYOR: Mr. Fisher, under
8 what theory would Reid be constitutional? I
9 thought Reid basically said you can open the
10 door to testimonial hearsay. So isn't your --
11 why was your argument as applied? When would it
12 ever work --

13 MR. FISHER: Well, I -- I --

14 JUSTICE SOTOMAYOR: -- under your
15 theory?

16 MR. FISHER: -- I don't think it would
17 ever work, Justice Sotomayor. And we've made
18 that clear --

19 JUSTICE SOTOMAYOR: So answer ---

20 MR. FISHER: -- in our briefing too,
21 but --

22 JUSTICE SOTOMAYOR: -- Justice
23 Thomas's question. Why didn't you just say Reid
24 is unconstitutional?

25 MR. FISHER: Well, because, remember,

1 we were in the New York court of appeals facing
2 Reid, and I think what we said to the New York
3 court of appeals was, if there's any chance that
4 Reid has any legitimacy to it, it would have to
5 be limited to something like the rule of
6 completeness.

7 There's a New York appellate division
8 case called Ko, and that's what the New York
9 court of appeals had relied on in Reid. And we
10 said, at the very least, you have to limit Reid
11 to the situation of a rule of completeness
12 scenario. And I think that would be the only
13 arguable situation.

14 Now, as we explain in our briefs, we
15 think even in a rule of completeness situation,
16 there would be no legitimate "open the door"
17 theory that would forfeit constitutional rights.
18 But we also admit, Justice Sotomayor, that's not
19 a question this Court would have to decide in
20 this case.

21 JUSTICE BREYER: We wouldn't, but I'm
22 curious, in your view, the -- the defendant's
23 argument is that he had on such and such a day a
24 fever of 103 and in the hospital. And the --
25 the Petitioner says, I would like to introduce

1 the records that are kept, the medical records,
2 which are, of course, hearsay, that shows he had
3 a temperature of 101.

4 Are you saying he can't do that? I
5 mean, he can't -- doesn't cross-examine the
6 people who -- who kept the medical records.
7 There were, like, you know, a lot of them in the
8 hospital.

9 MR. FISHER: Well, Justice Breyer, we
10 have no problem with the "opening the door"
11 theory as a matter of ordinary evidence law.

12 JUSTICE BREYER: No, it's not --

13 MR. FISHER: But we're asking --

14 JUSTICE BREYER: -- ordinary evidence
15 law, as you know perfectly well and I do, that
16 the problem with Crawford is that there are all
17 kinds of hearsay exceptions which do involve a
18 failure to cross-examine. You don't
19 cross-examine a hearsay exception. The person
20 isn't there. And which ones does Crawford keep
21 out and which ones doesn't? And is it just
22 historical or not?

23 Now I don't want to lead you down that
24 path where you need not go, but just in case you
25 have something that will be enlightening, I

1 wanted to give you a chance.

2 MR. FISHER: Well, if I think I
3 understand your question, you're right that our
4 theory is limited to testimonial statements and
5 that the Court has had a series of cases where
6 it's delineated that line.

7 As this case comes to this Court right
8 now, Morris's allocution is unquestionably
9 testimonial because it was made in formal ex
10 parte proceedings in front of a judge. And the
11 state, I don't think, disputes that proposition.

12 So what you have with you -- in front
13 of you is a classic case under Crawford where,
14 in Part III B of the opinion, the Court
15 painstakingly went through the historical
16 evidence and other sources of constitutional law
17 and held that if the witness is unavailable
18 through no fault of the defense or the
19 prosecution, but the statement is testimonial,
20 it has to be kept out.

21 And the weird thing about Reid is that
22 would in effect create an exception to that rule
23 in the most damaging of all circumstances when
24 the testimonial evidence is directly contrary to
25 the defense --

1 JUSTICE ALITO: Well, let me --

2 MR. FISHER: -- as I just said --

3 JUSTICE ALITO: -- give you another
4 example that's along the same lines as Justice
5 Breyer's. Let's say that Morris gave a
6 videotaped statement to the police and at the
7 beginning of the statement he said your client,
8 Mr. Hemphill, had nothing whatsoever to do with
9 this shooting, but then later, after being
10 confronted with evidence that undermines some of
11 the things he said, he said: Okay, fine, I
12 wasn't telling the truth before, he actually was
13 involved in this.

14 And then your client introduces the
15 first part of the statement, which is
16 exculpatory, somehow gets that in under state
17 habeas -- state hearsay law. Would you say that
18 the Confrontation Clause would bar the
19 prosecution from introducing the rest of the
20 statement where -- where Morris contradicted
21 what he said earlier?

22 MR. FISHER: Well, Justice Alito,
23 you're -- you're obviously asking about the rule
24 of completeness scenario that's not present in
25 this case. So our first answer would be, yes,

1 we think the Confrontation Clause would prohibit
2 the prosecution even then.

3 But I would hasten to add, Justice
4 Alito, I don't think Mr. Hemphill in your
5 hypothetical would be allowed to introduce that
6 first part of the statement in the first place.

7 JUSTICE ALITO: Well, I don't know how
8 he could, but I'm not sure how some of the
9 evidence that was -- some of what was introduced
10 here by the prosecution was admissible, but
11 that's a matter of state hearsay law.

12 But, seriously, you -- you -- you
13 think that a trial could -- could entertain that
14 travesty where the exculpatory part of a
15 statement is introduced, that's permitted, but
16 the inculpatory part is not introduced?

17 MR. FISHER: Again, I think you
18 wouldn't ever have that scenario because it
19 would be inadmissible in the first instance
20 under Rule 403, which under Crane and Holmes the
21 Court has said can be enforced. So the state --
22 if the state were to object, Justice Alito, that
23 objection should be sustained.

24 But I don't want to be fighting your
25 hypothetical too hard. I do understand you're

1 asking me a question about the rule of
2 completeness, and I think what the Court said in
3 Crawford and Giles is that only historically
4 grounded exceptions to the Confrontation Clause
5 are permitted.

6 And we don't see any evidence --

7 JUSTICE KAGAN: But that goes beyond
8 this case, doesn't it --

9 MR. FISHER: It goes well --

10 JUSTICE KAGAN: -- Mr. Fisher?

11 MR. FISHER: -- far beyond that case.

12 JUSTICE KAGAN: I mean, we don't have
13 to touch that, do we? Why should we touch it, I
14 suppose? Why are you even arguing it?

15 MR. FISHER: I'm just answering
16 Justice Alito's question.

17 JUSTICE KAGAN: Okay.

18 MR. FISHER: I don't think you do have
19 to go anywhere near that in this case, Justice
20 Kagan, and I think I would readily admit that's
21 a much harder question for you to have --

22 JUSTICE ALITO: Well, we --

23 JUSTICE KAVANAUGH: Mr. --

24 JUSTICE ALITO: -- we --

25 JUSTICE BARRETT: Mr. Fisher?

1 JUSTICE ALITO: -- we take cases for
2 the most part -- excuse me.

3 JUSTICE BARRETT: Go ahead.

4 JUSTICE ALITO: We take cases for the
5 most part to decide important legal questions
6 and not just to determine whether there was an
7 error in a particular criminal trial in the
8 Supreme Court of New York for the County of the
9 Bronx, right?

10 So the important legal question here
11 is whether there can be a waiver of the
12 Confrontation Clause right either expressly or
13 implicitly. That's the underlying -- that's
14 what's important about this case.

15 And it may well be that the -- the New
16 York "open the door" rule goes too far, and you
17 just want a ruling on the app -- on this
18 particular case, but isn't that the underlying
19 question --

20 MR. FISHER: Well --

21 JUSTICE ALITO: -- that is important
22 here?

23 MR. FISHER: -- I think that is a
24 broader framing of the question than the Court
25 needs to resolve in this case. There is a very

1 important legal question that arises under the
2 New York court of appeals decision in Reid and
3 which also has been adopted, as we noted in our
4 cert petition, by a Fifth Circuit decision in a
5 New Hampshire Supreme Court decision.

6 And that position is, leaving entirely
7 aside the rule of completeness, you have three
8 -- two states -- two state courts of last resort
9 and one federal court of appeals that have said
10 that merely introducing a defense or evidence
11 that could be contradicted by an out-of-court
12 testimonial statement is enough to forfeit the
13 Confrontation Clause right.

14 And that is a very important rule that
15 if it were adopted, as we said in our cert
16 petition and again in our merits brief, would
17 effectively wipe out the Confrontation Clause or
18 at least render it toothless in all the
19 situations where it matters the very most.

20 CHIEF JUSTICE ROBERTS: But is there
21 --

22 MR. FISHER: You can go all the way --

23 CHIEF JUSTICE ROBERTS: -- is there a
24 difference in -- in -- maybe it's a variation on
25 Justice Alito's question, but it may be an

1 important one.

2 It's one thing to say if the import of
3 the testimony that's introduced is, you know, I
4 wasn't there and the testimony that cannot be
5 confronted is he was there.

6 But it's another thing if what's being
7 admitted is nobody has said that I was there
8 and, in fact, the witness who can't be
9 confronted said he was there. It's sort of not
10 for the truth of the matter asserted, whether he
11 was there or not, but a very specific
12 incontrovertible statement, the person said he
13 was there and he says --

14 MR. FISHER: Yeah.

15 CHIEF JUSTICE ROBERTS: -- nobody said
16 I was there. Is that a violation of the
17 Confrontation Clause?

18 MR. FISHER: So, Mr. Chief Justice,
19 I'm going to answer your question, but I first
20 want to say I agree, that's also a hard
21 hypothetical. I've not found a single case in
22 over 400 years of common law jurisprudence with
23 the rule we pronounced where that has ever come
24 up. And I think the reason why it never --

25 CHIEF JUSTICE ROBERTS: Well, there's

1 always a first time.

2 (Laughter.)

3 MR. FISHER: I mean, the reason why it
4 never comes up -- just to finish that -- my
5 preface, if you'll forgive me -- is because that
6 statement that you're imagining would be barred
7 itself by the hearsay rule. He couldn't comment
8 as to what somebody else out of court said or
9 didn't say.

10 But, if you had a hypothetical like
11 that, notwithstanding the Rules of Evidence and
12 over 400 years since King v. Payne for the rule
13 that we're propounding here, I think then I
14 would still say that the Confrontation Clause
15 would bar that remedy.

16 I think there would be other remedies
17 that the trial court could resort to, starting
18 with striking the defendant's testimony,
19 instructing the jury to disregard it, maybe even
20 informing the jury of -- of some other
21 background fact, not for a -- not for the truth
22 of the matter asserted to solve the problem.

23 And I think, Mr. Chief Justice, you've
24 given a much more extreme version --

25 CHIEF JUSTICE ROBERTS: Well, what if

1 the witness --

2 MR. FISHER: -- about the state's --

3 CHIEF JUSTICE ROBERTS: -- what if the
4 witness is not there because the defendant
5 murdered him?

6 MR. FISHER: Well, that would raise a
7 Giles question. And if the reason for murdering
8 the witness was to keep the witness from
9 testifying, the Court's holding in Giles
10 would -- would -- would have a forfeiture there.

11 CHIEF JUSTICE ROBERTS: You mean, if
12 he murdered him for some other reason, it
13 doesn't make a difference?

14 MR. FISHER: That's the holding of
15 Giles, Mr. Chief Justice. And I think what
16 Giles said is that it has to be an intentional
17 act on the defendant's part to keep the witness
18 from testifying. And I think that just
19 highlights -- even if you think Giles is a harsh
20 rule, it highlights how strict forfeiture is in
21 the Confrontation Clause context --

22 JUSTICE BARRETT: Mister --

23 MR. FISHER: -- and, indeed, across
24 all constitutional doctrine.

25 The defendant has to do something

1 inconsistent with asserting the right. I think
2 that's the easiest way to put it at the very
3 least. And Mr. Hemphill has done nothing
4 inconsistent with asserting his right to
5 cross-examine Morris.

6 He didn't introduce any statements
7 Morris made out of court, nor did he comment at
8 all on anything Morris said or didn't say. He's
9 just simply said, I have a right to
10 cross-examine the person whose testimony is
11 being used against me --

12 JUSTICE BARRETT: Mister --

13 MR. FISHER: -- which is the most
14 fundamental of all objections.

15 JUSTICE BARRETT: Mr. Fisher, let me
16 put it to you this way. Let's say that we
17 disagree with you that the rule of completeness
18 violates the Confrontation Clause, but we're
19 inclined to agree with you that the door-opening
20 rule does.

21 How do we describe the rule? Because,
22 I mean, I -- I think kind of what all these
23 questions are getting at is that the rule of
24 completeness seems like the same thing but at a
25 more precise level of generality, the

1 door-opening rule.

2 So, I mean, Justice Alito is right, we
3 don't want to write an opinion just to address
4 the facts of this case, but we would have to be
5 careful, right, if we agreed with you, to write
6 the opinion in a way that didn't close the door,
7 so to speak, on the rule of completeness
8 problem.

9 MR. FISHER: Right. So there would be
10 two ways that the Court could in a future case
11 distinguish the rule of completeness, neither of
12 which would undercut a ruling in my favor here.

13 One is the Court could say what the
14 Court said in Beech Aircraft, which is, when the
15 rule of completeness is invoked, the statement
16 is invoked for -- the statement is later
17 introduced for a non-hearsay purpose to give a
18 broader context for the original statement.

19 Here, by contrast, there's no doubt
20 and the state openly admits that Morris's
21 allocution was introduced for the truth of the
22 matter asserted, to prove what gun he had at the
23 scene of the crime supposedly.

24 The second way you could distinguish
25 rule of completeness would be that under a

1 theory where if the defendant put in part of an
2 out-of-court statement, for example, here, if
3 Mr. Hemphill had put in part of Morris's
4 allocution, you could think in that context that
5 the defendant has made Mr. Morris in effect his
6 witness. He is the one who has invoked his
7 testimony. And so it's not a witness against
8 him because the prosecution is now simply in
9 effect filling out the testimony of the defense
10 witness.

11 Again, neither of those theories would
12 get you in any trouble to write an opinion that
13 we're asking you to write today and with a
14 footnote that reserves the rule of completeness
15 simply saying that if the prosecution comes to
16 court and all they say is this testimonial
17 statement contradicts what the defense theory
18 is, that that cannot be enough to forfeit
19 Confrontation Clause rights.

20 JUSTICE KAVANAUGH: Mr. Fisher?

21 MR. FISHER: Yes?

22 JUSTICE KAVANAUGH: Mr. Fisher, isn't
23 there another way to write it? I'm -- I'm not
24 saying that we should do this, but another way,
25 picking up from Professor Freedman's amicus

1 brief, would be that the rule of completeness is
2 a historically grounded rule that has existed
3 for centuries, but what happened here goes
4 beyond the rule of completeness for reasons that
5 Justice Barrett identified, the level of
6 generality.

7 MR. FISHER: Well, I think you're
8 certainly correct, Justice Kavanaugh, that the
9 rule of completeness does have historical roots
10 that are completely absent from the broader
11 open-the-door theory that's in front of you
12 today.

13 I'm not so sure that those common law
14 roots and the state hasn't pointed to any
15 evidence to the contrary that those common law
16 roots included using that rule against
17 defendants in criminal cases, and that would be
18 --

19 JUSTICE KAVANAUGH: Well, Professor --

20 MR. FISHER: -- the question under
21 Crawford.

22 JUSTICE KAVANAUGH: Sorry to
23 interrupt. Professor Freedman acknowledges that
24 but says there's no indication that it would be
25 applied only in favor of and not against a

1 criminal defendant as well, but I take your
2 point on that, and -- and he responds to that as
3 well.

4 MR. FISHER: I -- I -- I think --
5 Justice Kavanaugh, maybe the short answer is I
6 think you're right, that would be at least
7 another ground the Court would want to look at
8 carefully. And if the Court wanted to reserve
9 that piece of it as well, you know, sketching
10 out different theories where the rule of
11 completeness may be different, there would be no
12 problem with that here, and you could look at it
13 more closely if that case ever arose.

14 It would certainly, again, not get in
15 the way of this case. My -- and my critical
16 submission to the Court right now would be that
17 this so-called "opening-the-door" theory based
18 on mere contradiction of the defendant's case is
19 wholly without common law foundation, and that's
20 particularly striking for two reasons.

21 One is even though the Court in
22 Crawford and Giles and other cases has said that
23 the Confrontation Clause codifies the common law
24 right, the state has openly admitted in its
25 brief that it has no historical support for the

1 rule that it's arguing for today.

2 And that -- that -- that's -- that's a
3 big concession given that, for hundreds of
4 years, defendants have gone into court and said,
5 somebody else did it or I wasn't there or I
6 acted in self-defense, as Mr. Crawford himself
7 said, or as Mr. Raleigh said, I didn't
8 participate in this plot, and then the
9 out-of-court statement said, yes, you did.

10 Since the beginning of the criminal
11 law, defendants have defended themselves in ways
12 that out-of-court statements could be introduced
13 to directly contradict their test -- their --
14 their own defense, and the common law up to the
15 founding and 200-plus years since the founding
16 has always kept those statements out absent an
17 opportunity for cross-examination.

18 JUSTICE ALITO: Can I take you back to
19 Justice Thomas's first question about what you
20 did and did not raise in the court of appeals?
21 You pointed to page 388. Maybe I'm missing the
22 most important language on 388, but in the --
23 the final -- the second full paragraph on 388,
24 you -- your brief began, "The Appellate
25 Division's analysis equates presenting a valid,

1 evidence-based third-party defense with
2 misleading the jury."

3 And then the final sentence -- I
4 gather this is -- this is what you're referring
5 to. It's the only one that refers to the
6 Confrontation Clause. "Such an approach is
7 absurd in the context of the Confrontation
8 Clause, the purpose of which is to afford the
9 accused the right to meaningfully test the
10 prosecution's proof." And this is under the
11 section of the brief that is labeled The Defense
12 Did Not Open the Door.

13 I mean, if I were on the New York
14 court of appeals, I would interpret that
15 argument to mean that there was a misapplication
16 of the opening-the-door test and it was this
17 misapplication that violated the Confrontation
18 Clause.

19 I'd be pretty sore, I'll tell you, if
20 I were a judge on the New York court of appeals
21 and I got back from this Court a decision that
22 said you -- you erred in your understanding of
23 the Confrontation Clause when the only thing I
24 had before me was this sentence.

25 MR. FISHER: Justice Alito, you're

1 asking an important question, and I want to give
2 you three answers.

3 JUSTICE ALITO: Yeah.

4 MR. FISHER: So -- so, first, it's not
5 just in that last sentence there; it's also
6 earlier in the paragraph that the Confrontation
7 Clause is mentioned. The Confrontation
8 Clause --

9 JUSTICE ALITO: Yeah, okay.

10 MR. FISHER: -- was also mentioned on
11 page 386, where what -- where what Mr. Hemphill
12 argued was that if relevance is enough to
13 overcome a Confrontation Clause objection, that
14 would violate the Sixth Amendment. So that's
15 the first thing, is that the Confrontation
16 Clause was threaded through this argument.

17 The second thing is it's important to
18 remember the context in which this arose. Mr.
19 Hemphill raised the argument under the Sixth
20 Amendment from the first moment of trial that
21 introducing Morris's allocution would violate
22 Crawford and the Confrontation Clause.

23 That's -- that's his federal claim,
24 that introducing Mr. Morris's allocution would
25 violate the Confrontation Clause. Opening the

1 door is the state's answer to that claim.

2 And so the state is coming to you now
3 saying even though we presented -- prevented --
4 I'm sorry, persuaded the New York courts to
5 adopt our response to his Sixth Amendment
6 argument, the defendant doesn't have the right
7 to keep making his Sixth Amendment argument.

8 And the last thing I would say,
9 Justice Alito, is even if the way you read the
10 arguments we made to the New York court is to
11 say, look, we understand that Reid holds as a
12 matter of Sixth Amendment law that a defendant
13 can waive or forfeit his confrontation right
14 simply by presenting evidence that could be
15 contradicted by testimonial hearsay.

16 And we pushed back against Reid in the
17 New York court of appeals without directly and
18 explicitly saying we think Reid is entirely
19 wrong anyways. That would just make this case
20 exactly like two of the Court's recent cases
21 where it found no preservation problem.

22 One is Holmes, where the Court wrote
23 the unanimous opinion, I believe you authored
24 it, and the state made exactly the same argument
25 that the state is making here, where the first

1 six pages of South Carolina's brief in that
2 case, that what the defendant had done there is
3 simply argue for the misapplication of a prior
4 decision of the South Carolina Supreme Court.
5 And this Court didn't even deem that argument in
6 the opinion worthy of comment. In Riley against
7 California, you had the same scenario.

8 Now I don't think we're even as far
9 out on the edge as either of those two cases,
10 but what you have is a common theme where
11 defendants go to a state court of appeals or a
12 state high court, whatever it may be called, and
13 say our -- our constitutional rights were
14 violated, and if that prior opinion is applied
15 in this case to -- to -- against me, that would
16 itself violate the Constitution. And I think
17 the Court has always found that that's enough to
18 preserve a federal constitutional argument for
19 this Court. And that's what we'd rest on if --
20 if -- if we needed to.

21 The last thing I'd like to say before
22 turning to any of the Court's one-by-one
23 questions or reserving the remainder of my time,
24 Justice Breyer, you asked me a question earlier
25 about the testimonial theory of Crawford. And,

1 obviously, my first answer is that's not in
2 front of you here today. But going back to the
3 New York court of appeals opinion in Reid, it
4 cited the case -- this Court's decision in
5 Harris, which involved the Miranda rule and a
6 forfeiture exception to the Miranda rule.

7 And I want to draw out one important
8 difference there. Even if you didn't want to
9 get wrapped up in the testimonial versus
10 non-testimonial line under Crawford, it's
11 important to note that this case is miles away
12 even from Harris. First of all, Harris involves
13 a prophylactic rule, and this involves a rule of
14 exclusion in the Constitution itself.

15 And the other thing in Harris is what
16 the Court said is the truth-seeking process of
17 the courts should not be perverted by allowing
18 the defendant to -- to manipulate evidence and
19 keep out trustworthy evidence.

20 Well, what you have here, even if you
21 leave Crawford entirely aside, is the classic
22 form of presumptively unreliable evidence the
23 Confrontation Clause has always been concerned
24 with.

25 JUSTICE BREYER: Or that's this case.

1 MR. FISHER: You have -- you have a
2 statement of a third party spreading blame,
3 denying -- denying guilt at least as to the type
4 of gun involved in the homicide, and giving a
5 self-exonerating statement in coordination with
6 the state with contemplation of further
7 prosecution.

8 And so whatever theory of the
9 Confrontation Clause you may have, this is the
10 classic kind of statement that needs to be kept
11 out. And in Kirby in 1899, the Court said that
12 guilty pleas of accomplices are not admissible
13 against criminal defendants. So, again, what
14 you have here, just dressed up in different
15 garb, is a classic Confrontation Clause
16 violation under any theory of the clause.

17 I'm happy to take one-by-one questions
18 if the Court has any.

19 JUSTICE THOMAS: Don't you think it's
20 a bit odd that the court of appeals disposed of
21 this on an abuse-of-discretion standard, that if
22 it had been -- that if it thought it had a
23 constitutional issue before it, it would not
24 have disposed of it on that standard?

25 MR. FISHER: I agree, Justice Thomas,

1 it is odd that it's framed in terms of abuse of
2 discretion. I will tell you, from reading a lot
3 of lower court Crawford cases, that this happens
4 quite regularly as the courts get -- they sort
5 of mix up evidence and confrontation law.

6 But, Justice Thomas, if you look at
7 the briefs in the New York court of appeals, the
8 only thing we were arguing about was whether or
9 not the Sixth Amendment was violated. The only
10 argument we were making was that the
11 Constitution had been violated.

12 And -- and even when we argued --
13 this goes back to Justice Alito's question --
14 even when we argued that the door was not open,
15 what we were arguing was, under Reid's
16 constitutional holding about opening the door,
17 we didn't satisfy that rule.

18 JUSTICE THOMAS: And a much different
19 question and probably not nearly -- not -- not
20 that important, but I'm not -- I'm a bit
21 confused as to what amounts to a constitution --
22 a Confrontation Clause violation.

23 For example, if I say you were --
24 Hemphill was there and he was the shooter, and
25 that, of course -- that if Morris had done that,

1 I think we'd both agree that's a problem. But
2 the -- in the -- in Morris's allocution, he
3 said, I had a .357 magnum. How is that -- I
4 know its use could be -- that it could be used
5 to confront or to disagree with or contradict
6 Hemphill, but I don't see Morris's statement by
7 itself about himself being a constant -- a
8 Confrontation Clause problem.

9 MR. FISHER: Well, my answer, Justice
10 Thomas, starts with the text of the Sixth
11 Amendment, which, remember, gives the defendant
12 the right to be confronted with the witnesses
13 against him.

14 JUSTICE THOMAS: So how is that
15 against him?

16 MR. FISHER: So you have two
17 questions.

18 JUSTICE THOMAS: That's -- Morris
19 didn't say anything about Hemphill.

20 MR. FISHER: Right. So he's -- so,
21 certainly, Morris is acting as a witness when he
22 gives that statement.

23 JUSTICE THOMAS: But against him.

24 MR. FISHER: And against is answered
25 by the Court's decision in Melendez-Diaz. In

1 Melendez-Diaz, the Court said that if the
2 prosecution enters a testimonial statement from
3 a witness, that itself is what renders it
4 against the defendant. It doesn't have to be
5 directly accusatory.

6 If the rule were otherwise, in every
7 case where the prosecution had a circumstantial
8 case without a direct accusation, it could prove
9 its entire case with affidavits otherwise under
10 the Confrontation Clause.

11 JUSTICE THOMAS: Well, I --

12 MR. FISHER: It's never been limited
13 to --

14 JUSTICE THOMAS: -- I understand if
15 you say it further -- it advances one of the
16 elements of the crime. I get -- I understand
17 that.

18 But, if someone admits something that
19 has nothing to do with the defendant, but it's
20 inconvenient for the defendant or contradicts
21 the defendant, you -- yeah, you say, well, the
22 use of this statement harms the defendant.

23 You could say that about weather. You
24 could say it about, you know, geography. You
25 could say it about lots of things. Someone

1 could say: Oh, North Carolina is south of
2 Georgia, and you could introduce someone saying
3 -- you know, evidence that it's not.

4 I mean -- well, that's evidence
5 against them. I don't see how you do that. I
6 don't see how you could take something that's
7 neutral and just because it's used to contradict
8 the defendant, that is now witness against the
9 defendant.

10 MR. FISHER: Right. So -- so two
11 answers, Justice Thomas. The first is this
12 is -- this is answered by Melendez-Diaz --

13 JUSTICE THOMAS: Yeah.

14 MR. FISHER: -- where the Court said,
15 if a statement is testimonial and the
16 prosecution then introduces it, that's what
17 makes it against the defendant.

18 But, Justice Thomas, even if you had
19 some problem with the Melendez-Diaz holding on
20 that score, I would urge you to focus back on
21 this particular case. Remember that Morris's
22 defense was that Hemphill did it. And the
23 prosecution itself at the time of this plea and
24 allocution told the Court, we're getting this
25 allocution with an eye toward future prosecution

1 of somebody else.

2 So, in context, him saying I had a
3 .357 and not a 9-millimeter is in effect
4 pointing the finger at Mr. Hemphill, which was
5 his entire defense all along.

6 JUSTICE THOMAS: Uh-huh.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer?

9 JUSTICE BREYER: Now you've thought of
10 this, I bet, but you needn't say it because this
11 is not -- I could think of 15 ways of getting
12 your case out of this question, all right?

13 But there is a general question.
14 Hearsay is statements made out of court for
15 their truth. And we have, I looked up here, 24
16 exceptions, including, for example, baptismal
17 certificates.

18 So, if you were to take Crawford
19 literally and keep out every statement on the
20 constitutional ground made for its truth, well,
21 that's the end of the hearsay exceptions. So
22 that can't be right.

23 Then this Court has said it isn't
24 right. And they said let's look to see if the
25 hearsay exceptions are -- and now they've said

1 justified by history, justified by maybe trying
2 to kill a witness who is going to testify
3 against you, and not gone much further. Okay?

4 I've said, look at the purposes. Look
5 at the consequences. Look at how it fits in.
6 Not everybody agrees with that. What do you
7 think?

8 MR. FISHER: So I -- I think -- what I
9 think is what the Court held in Crawford, which
10 is you don't go straight from -- from is it
11 hearsay to is that hearsay exception firmly
12 grounded. That's more like what the Roberts
13 theory was. What you do under Crawford is you
14 ask an intermediate question in between those
15 two, which is, is the statement testimonial?
16 And for the vast --

17 JUSTICE BREYER: Yes, it's
18 testimonial, of course.

19 MR. FISHER: -- for the -- for the
20 vast majority of hearsay exceptions, the answer
21 is unequivocally no.

22 JUSTICE BREYER: Really?

23 MR. FISHER: Yes.

24 JUSTICE BREYER: A baptismal
25 certificate is a person who at one point in time

1 signed a piece of paper which said Joe Jones was
2 baptized on such and such a date. Now --

3 MR. FISHER: But not with an eye
4 toward future criminal proceedings.

5 JUSTICE BREYER: Ah, there has to be
6 an eye towards future criminal proceedings.
7 Otherwise Crawford doesn't apply?

8 MR. FISHER: I think that's the
9 holding in Crawford and subsequent cases.

10 JUSTICE BREYER: Okay, okay, okay.
11 Eye towards future criminal proceedings.

12 MR. FISHER: Yes.

13 JUSTICE BREYER: So, therefore, crime
14 labs are in, but hospitals are out?

15 MR. FISHER: For the most part,
16 hospitals are out. I don't -- I wouldn't
17 venture every possible hypothetical.

18 JUSTICE BREYER: No, no, no. Criminal
19 hospitals are in or excepted.

20 MR. FISHER: I think there can be, you
21 know, forensic examination --

22 JUSTICE BREYER: With an eye toward --

23 MR. FISHER: -- of hospitals that are
24 a borderline case.

25 JUSTICE BREYER: Okay. Thank you,

1 thank you, thank you.

2 MR. FISHER: And, you know, you may
3 see that in the future.

4 JUSTICE BREYER: All right.

5 MR. FISHER: Yeah.

6 CHIEF JUSTICE ROBERTS: Justice Alito,
7 do you have any further?

8 Justice Kagan?

9 JUSTICE KAGAN: Mr. Fisher, the -- New
10 York argues that the Reid rule ought to be
11 viewed as essentially a procedural device along
12 the lines of other procedural devices which
13 we've said fall outside the ambit of the
14 Confrontation Clause. I believe it -- it -- it
15 references Illinois v. Allen, it rep -- it
16 references Melendez-Diaz.

17 Why -- why is that wrong?

18 MR. FISHER: So for two reasons. One
19 is the New York Guide to Evidence itself calls
20 the rule of completeness and the more broader
21 opening-the-door theory Rules of Evidence, so
22 just as a matter of nomenclature and
23 characterization under New York law, the state
24 is wrong.

25 But just leaving labels aside, the

1 reason why the state is wrong is because the
2 admissibility of a statement under the
3 opening-the-door theory turns on the contents of
4 the statement. And that's to be -- that's to be
5 contrasted with situations like notice and
6 demand under Melendez-Diaz or Illinois versus
7 Allen or things that depend on things having to
8 do not with the content of the defendant's case
9 but, rather, about his timeliness of an
10 objection or his other -- you know, other
11 procedural actions he might take.

12 So we distinguish substance of the
13 statement rules, which are evidence rules and
14 which run into the Confrontation Clause, from
15 just procedural devices to manage the trial with
16 defendants have to meet under the Confrontation
17 Clause and any other constitutional right.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 JUSTICE GORSUCH: Good morning, Mr.
21 Fisher. So I -- I suppose the state may try and
22 come back and suggest that its rule is actually
23 pretty close to and not much of an outgrowth of
24 the rule of completeness.

25 What -- what are the distinguishing

1 features in your mind that make this radically
2 different?

3 MR. FISHER: The core distinguishing
4 feature is that in a rule-of-completeness
5 situation, the defendant has put in part of the
6 absent witness's statement into play, whereas,
7 here, Mr. Hemphill did not put Mr. Morris's
8 testimony or anything else he said into play.

9 JUSTICE GORSUCH: Why not? With the
10 statement about the 9-millimeter casing found,
11 where else would it have come from?

12 MR. FISHER: Well, that's just a true
13 fact about evidence found in Mr. Morris's
14 apartment. And that's far different than what
15 he said. And, again, Justice Gorsuch, I just
16 return to the text and purpose of the
17 Confrontation Clause, which doesn't have to do
18 with the substance of defenses. It has to do
19 with witness testimony. And so --

20 JUSTICE GORSUCH: I understand that.
21 But just in terms of drawing a line between this
22 and a rule of completeness argument, if we were
23 concerned of not doing that, how would you go
24 about writing that?

25 MR. FISHER: I would write it to say

1 that -- that we leave for another day any
2 question about forfeiture where the defendant
3 himself introduces part of the absent witness's
4 statement or -- or any statement by that absent
5 witness.

6 That would present a different
7 question from one where the defendant simply
8 presents a substantive defense through evidence
9 and argumentation that -- that can be
10 contradicted by the state.

11 JUSTICE GORSUCH: A fact in the world?

12 MR. FISHER: Yes.

13 JUSTICE GORSUCH: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh, anything further?

16 JUSTICE KAVANAUGH: No further
17 questions.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: No.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Ms. Mignola.

24 ORAL ARGUMENT OF GINA MIGNOLA
25 ON BEHALF OF THE RESPONDENT

1 MS. MIGNOLA: Mr. Chief Justice, and
2 may it please the Court:

3 Now you have recognized, I think, that
4 the Petitioner is asking for a broad and
5 sweeping rule. He's essentially claiming that a
6 defendant can never open the door to the
7 admission of evidence that would otherwise be
8 barred by the Confrontation Clause. It doesn't
9 matter if a defendant has misled the jury, and,
10 really, if his approach is taken to its extreme,
11 even the traditional rule of completeness would
12 fall.

13 He surely is wrong about that, but I
14 want to call your attention to the fact that New
15 York State's highest court, he did not present
16 that broad claim that New York's
17 opening-the-door rule was unconstitutional on
18 its face. He presented only an unconstitutional
19 as applied to him challenge. New York's court
20 had no occasion to consider whether the rule is
21 unconstitutional on its face.

22 Because he bypassed New York's high
23 court, review of this claim should be outside of
24 this Court's jurisdiction. Even if this Court
25 could review the claim, it should certainly

1 reject it.

2 New York's rule, the trial court may
3 provide a limited but necessary remedy when the
4 defendant creates a misleading impression, the
5 rule is constitutional. As this Court has
6 recognized, like any other constitutional right,
7 the right to be confronted with witnesses is not
8 absolute. There are limitations.

9 And limitations are appropriate if
10 they have a legitimate purpose, and New York's
11 rule does. It allows the state court to protect
12 the vital interests that it has in the integrity
13 and truth-seeking function of the trial process.

14 This is not about being fair to the
15 prosecution. It's about the jurors and the
16 Court's duty to make sure that jurors are not
17 unfairly misled.

18 Moreover, a state may impose rules
19 that govern the manner in which a defendant may
20 assert or forfeit, even by his silence, his
21 right of confrontation. New York's rule is an
22 appropriate limitation in this regard.

23 It's not an exception to the
24 Confrontation Clause because it is not a
25 substitute means for the prosecution to

1 establish the reliability of evidence. It's a
2 remedy, a remedy that is triggered when the
3 defendant or his lawyers' intentional trial
4 conduct violates the state's prohibition against
5 misleading the jury.

6 I do welcome the Court's questions.

7 JUSTICE THOMAS: Mr. Fisher gave some
8 examples in the record as to why he raised --
9 Petitioner raised the Confrontation Clause issue
10 below.

11 Would you address those specifics that
12 he raised?

13 MS. MIGNOLA: Well, Your Honor, I
14 think if you look at the joint appendix starting
15 at page 385, this is what he told the New York
16 Court of Appeals: "The only issue before this
17 Court is whether the defense opened the door to
18 Morris's testimonial hearsay."

19 Now, that is simply not a challenge to
20 the constitutionality of New York's rule on its
21 face. He did raise a Sixth Amendment challenge.
22 He did invoke the Confrontation Clause. But
23 that is not the same thing as saying the rule on
24 its face is unconstitutional.

25 I believe that's the question that

1 this Court has been asked to review, and it
2 simply was not presented to New York's highest
3 court. He should not be allowed to bypass the
4 state court in that way.

5 And that's particularly true in this
6 case, where the state's high court had an
7 adequate and independent basis to reject the
8 claim. Petitioner failed to preserve the broad
9 constitutional claim and, therefore, by state
10 statute, the New York Court of Appeals lacked
11 the jurisdiction to review it. By bypassing the
12 state high court, he's avoided, he avoided an
13 explicit ruling --

14 JUSTICE KAGAN: Ms. Mignola -- I'm
15 sorry.

16 MS. MIGNOLA: Yes, Your Honor?

17 JUSTICE KAGAN: Complete your
18 sentence. I'm sorry.

19 MS. MIGNOLA: He avoided an explicit
20 ruling that the -- from that court denying the
21 claim on adequate and independent state law
22 grounds. So to review that claim now will
23 encourage litigants in the future to withhold
24 from a state court a claim challenging the --
25 the constitutionality of a state rule so that

1 the state cannot have the opportunity to reject
2 it on adequate and independent state law
3 grounds.

4 JUSTICE KAGAN: This -- this was all
5 addressed at the cert petition stage, was it
6 not?

7 MS. MIGNOLA: Yes, I think that it
8 was, but I think it was still perhaps an
9 improvident grant.

10 CHIEF JUSTICE ROBERTS: What about our
11 decision in Riley? Your friend suggests that
12 that's a strong argument against your point.

13 MS. MIGNOLA: You know, I --

14 CHIEF JUSTICE ROBERTS: That we did in
15 Riley exactly what you said we shouldn't do
16 here.

17 MS. MIGNOLA: Well, I would suggest
18 instead that, in Riley and Holmes, there were
19 moments where the broader constitutional claim
20 was presented. They may not have done it in --
21 in the way that we're saying it should have
22 happened, but they did do it at some point.

23 I think that this Court's decision in
24 Illinois v. Gates is actually more informative,
25 more instructive, because there the -- the

1 Petitioner did raise a Fourth Amendment
2 suppression claim throughout.

3 However, when this Court considered
4 whether it could consider a modification to the
5 exclusionary rule, this Court recognized that
6 that claim had not been presented to the state
7 court and that, therefore, it should not be
8 reviewed.

9 JUSTICE BREYER: What about all the
10 things on 386, 388? I mean, he mentions the
11 Confrontation Clause a bunch of times, and I
12 suppose he'd be satisfied if we just said, well,
13 as applied to his case, the -- it's
14 unconstitutional.

15 MS. MIGNOLA: There is no doubt that
16 he raised a Confrontation Clause claim, but he
17 raised it as applied to him. He said simply --

18 JUSTICE BREYER: Well --

19 MS. MIGNOLA: -- that --

20 JUSTICE BREYER: -- what difference
21 does that make? If we give a reason that he's
22 right and the reason applies to more than his
23 case, that might be perfectly satisfactory to
24 you then, wouldn't it?

25 MS. MIGNOLA: Well, I think it does

1 make a great deal of difference to New York's
2 courts. I think they should have the
3 opportunity to see how -- the -- the broader
4 constitutional question before them.

5 JUSTICE BREYER: Well, that might be
6 true. He's given a bunch of reasons in his
7 briefs why about it's unconstitutional. And,
8 certainly, a large number of those are pretty
9 strong. And -- and suppose we just said, well,
10 those are the reasons. That wouldn't strike
11 down the whole law. It would just say that the
12 door opening is not applicable in those cases.

13 So I'm anxious to hear what your
14 argument is on the merits of that.

15 JUSTICE BARRETT: Ms. Mignola, can I
16 ask -- oh, sorry. Did you have more you wanted
17 to say?

18 Ms. Mignola, can I turn to the merits?
19 On pages 19 to 21 of Mr. Fisher's brief, he
20 points out that under this rule of completeness,
21 some of our cases, even Crawford itself,
22 presumably -- you know, he makes the argument
23 that -- that evidence that we said was
24 testimonial and barred by the Confrontation
25 Clause could have come in.

1 So, you know, in Crawford, he raises a
2 claim of self-defense. His wife's testimonial
3 statements, we said, had to stay out, but they
4 contradicted his claim of self-defense. What's
5 your answer to that?

6 MS. MIGNOLA: Well, if I understand
7 your question, Your Honor, I think that simply
8 contradicting the defense, simply if the people
9 have evidence that would contradict the defense,
10 that cannot be the basis for opening the door.
11 And that is something that we addressed in our
12 brief.

13 I think the New York standard is
14 different. There has to be something that is
15 truly misleading. And when you look at what is
16 misleading, it is very much like the way that
17 the traditional rule of completeness operates.

18 The hypothetical that was posed by the
19 Court, there are two portions of a statement,
20 right? One portion of the statement, the
21 declarant, perhaps a third-party suspect, right,
22 says, for example, yes, I possessed the murder
23 weapon, but a day before the murder, I sold it
24 to the defendant. The defendant offers the
25 first part of the statement but not the second.

1 JUSTICE BARRETT: But in this case --

2 MS. MIGNOLA: Yes.

3 JUSTICE BARRETT: -- this
4 contradiction-type case, to make -- to draw the
5 conclusion -- Mr. Fisher points out that to draw
6 the conclusion that the statement or that the
7 defendant's position is misleading requires a
8 value judgment on the part of the court that the
9 defendant is misleading. In other words, that
10 his rendition isn't true, but the other
11 outside-of-court statement was.

12 MS. MIGNOLA: So I don't think that it
13 is -- it does require that kind of analysis
14 because I do not believe that New York's rule is
15 that broad.

16 It cannot be -- I think Mr. Fisher is
17 right. It can't be that simply if the people
18 have evidence that merely contradicts the
19 defense theory of the case, that that opens the
20 door to evidence that would be -- otherwise be
21 barred by the Confrontation Clause.

22 I think it is a much more narrow rule.
23 There has to be something, some way in which the
24 defense has misled the jury. And in that regard
25 the judge is not making a decision about what is

1 true. The judge in this case is not making a
2 determination that Morris's guilty plea is true,
3 that those statements are correct.

4 JUSTICE SOTOMAYOR: So isn't there two
5 ways to prevent the jury from being misled --
6 misled? The first is simply to -- to keep out
7 what the defense is proffering. That's what
8 your adversary says. That's what Mr. Fisher
9 says. The trial judge, if he believed any of
10 the testimony or arguments he was making misled
11 the jury, he should have rejected them.

12 But the judge said no, these arguments
13 are legitimate.

14 MS. MIGNOLA: So --

15 JUSTICE SOTOMAYOR: So now the
16 question is -- and this is what he argued from
17 the trial court to the appellate court to the
18 court of appeals -- can I mislead the jury
19 simply by making legitimate arguments based on
20 legitimate evidence and open the door to
21 non-testimonial -- to non- --

22 MS. MIGNOLA: To testimonial hearsay.

23 JUSTICE SOTOMAYOR: To testimonial
24 hearsay, when I didn't present that testimonial
25 hearsay. I didn't present part of it. I didn't

1 do anything with it. Can you, the prosecutor,
2 violate the Confrontation Clause by introducing
3 something?

4 MS. MIGNOLA: So I think that --

5 JUSTICE SOTOMAYOR: Isn't that what
6 his argument was below?

7 MS. MIGNOLA: Yes. Again, it's as
8 applied to him.

9 JUSTICE SOTOMAYOR: Well, what --

10 MS. MIGNOLA: He said he didn't open
11 the door.

12 JUSTICE SOTOMAYOR: I don't understand
13 what "applies" means or not. My Confrontation
14 Clause was violated because the trial court
15 misapplied Reid. To me, that sounds like
16 misapplied Reid because it let in testimonial
17 hearsay when I didn't open the door. And even
18 if I opened the door, they couldn't do it.

19 That's what he argued, correct?

20 MS. MIGNOLA: He argued that the -- he
21 did not open the door.

22 JUSTICE SOTOMAYOR: Right --

23 MS. MIGNOLA: And so, yes.

24 JUSTICE SOTOMAYOR: -- because he
25 can't open the door legally, correct?

1 MS. MIGNOLA: But I think he's asking
2 this Court a broader question, whether a
3 defendant can open the door. That's his
4 question presented. And that question, that
5 broader question, was not presented to New York
6 State court.

7 But I want to --

8 JUSTICE SOTOMAYOR: Would it have --
9 would -- have you ever known the court of
10 appeals to go back on a decision like Reid that
11 it just decided and there are no material
12 changes between Reid and this case?

13 MS. MIGNOLA: Well --

14 JUSTICE SOTOMAYOR: And say we're
15 going to revisit Reid and there's no such thing
16 as opening the door? Or do you think it would
17 have said just what they were arguing, Reid
18 didn't open the door this way?

19 That's what he argued, correct?

20 MS. MIGNOLA: Right, but I think Reid
21 was at least seven years earlier. And so it may
22 very well, had Mr. Fisher with all of his
23 arguments and expertise, explained to the New
24 York Court of Appeals why he thought that a rule
25 of that nature was unconstitutional broadly

1 speaking, that a defendant could never open the
2 door, I think New York court should have had a
3 chance to review that, consider it, and
4 determine whether there were any modifications,
5 whether, for example, it should have said the
6 judge should have stricken the testimony,
7 stricken the evidence.

8 But, again, I -- I want to focus a --
9 a little bit on -- it's so important what was
10 happening here is not simply that the evidence
11 that was -- contradicted the defense theory.
12 That can't be what opens the door. I agree with
13 that. It has to be that there was something
14 misleading about what the defense was doing,
15 something that needs --

16 JUSTICE SOTOMAYOR: So identify that
17 here.

18 MS. MIGNOLA: I'm sorry, Justice --

19 JUSTICE SOTOMAYOR: Identify what was
20 misleading about what he did.

21 MS. MIGNOLA: Well, I think what was
22 misleading is that he was implying to the
23 jurors, first of all, that Mr. Morris's case
24 ended in a manner that was unsatisfactory, and
25 he really led the jurors to speculate about how

1 that prosecution ended.

2 Furthermore, he did something that
3 pretrial the judge had issued a very strong
4 ruling and had made a determination that a
5 theory of the defense was misleading, and that
6 was to ask the jurors to rely on the fact that
7 the prosecutors were charging him and,
8 therefore, they believed that Morris was guilty.

9 It was asking the jurors really for
10 vouching, and that's how the judge framed it,
11 that's how he talked about it, that the -- the
12 defense was -- wanted to rely on vouching, all
13 right?

14 And so, if you look, for example, in
15 the Joint Appendix at pages, I think, 48 through
16 56, there's a tremendous discussion in there
17 about what the judge saw was misleading.

18 Counsel's efforts to use the
19 prosecutor's previous opening or beliefs and
20 conclusions of the government actors as though
21 that were factual evidence that should be
22 considered for its truth --

23 JUSTICE SOTOMAYOR: The judge kept
24 that out. The jury didn't hear that.

25 MS. MIGNOLA: But he continued on that

1 strategy. Even though the jurors did not hear
2 the opening statement from the Morris trial, he
3 nevertheless came in his opening statement at
4 this trial, the defense came in this trial and
5 he made arguments that again picked up that
6 theme.

7 And he did a cross-examination of
8 Detective Jimmick and a cross-examination of
9 Gilliam, again, picked up that theme and he
10 certainly, you know, brought that theme home
11 just as the judge anticipated, brought it home
12 in his summation.

13 That was a -- you know, a piece of his
14 -- of what he was trying to do, was say: Look,
15 the government believed and relied on the
16 witnesses that identified Morris, and you can
17 too because of the fact that they relied on.
18 And that was improper, and the judge understood
19 that that was misleading.

20 JUSTICE GORSUCH: Do you -- do you
21 agree --

22 MS. MIGNOLA: And the judge understood
23 that they were really drawing -- asking the
24 jurors to draw an inference and to rely on
25 something that was out of bounds and was

1 unlawful, all right, and so that needed to be
2 corrected.

3 In addition, well, talking to the
4 jurors about how the Morris prosecution ended --

5 JUSTICE SOTOMAYOR: Counsel, you've
6 answered my question.

7 MS. MIGNOLA: I'm sorry.

8 JUSTICE SOTOMAYOR: Perhaps you'll let
9 Justice Gorsuch ask his.

10 MS. MIGNOLA: Yes.

11 JUSTICE GORSUCH: Thank you. Do you
12 agree that the rule of completeness
13 traditionally understood doesn't apply here
14 because the defendant didn't introduce any
15 out-of-court statement in evidence?

16 MS. MIGNOLA: Yes, Your Honor.

17 JUSTICE GORSUCH: Okay.

18 MS. MIGNOLA: I agree that this is not
19 a -- a -- a --

20 JUSTICE GORSUCH: This is something
21 beyond that.

22 MS. MIGNOLA: It is something, but it
23 relies so much on exactly that same principle
24 that --

25 JUSTICE GORSUCH: No, I -- I --

1 that -- that --

2 MS. MIGNOLA: Yes, Your Honor.

3 JUSTICE GORSUCH: -- that's the answer
4 to my questions. And then you also, as I
5 understood it, with Justice Breyer, I just want
6 to make sure I've got this right, you do not
7 object to this Court deciding the
8 constitutionality of the Reid rule as applied in
9 this case, is that right?

10 MS. MIGNOLA: I think that was
11 presented to the state court, yes, Your Honor.

12 JUSTICE GORSUCH: Okay. Thank you.

13 JUSTICE KAGAN: I mean, if I could
14 just go back to what Justice Barrett and Justice
15 Sotomayor were talking about about what this is
16 a supposed remedy for. You said that this rule
17 comes in as a remedy and you admit that it can't
18 be remedying the fact that the defendant
19 contested the prosecution's factual narrative.

20 But -- but really everything that
21 happened here, the rule was being used as a
22 remedy for that. I mean, the -- the -- the
23 statements that the government wanted to admit
24 are statements about whether the person whom the
25 defendant accused of committing the crime had a

1 particular kind of gun. And -- and -- and that
2 was being used to contest the defendant's idea
3 that, yes, this third party committed the crime.
4 He had the right kind of gun.

5 So, I mean, it's -- it's all about the
6 state trying to contest the defendant's
7 narrative, which is contesting the prosecution's
8 narrative.

9 MS. MIGNOLA: Your Honor, I agree that
10 the state was arguing for urging the court to
11 issue a broader ruling, but I think that at the
12 end of the day, I have to believe that the judge
13 didn't agree with that, and I'll tell you why.

14 If you look at the Joint Appendix
15 between pages 106 and 109, the judge draws this
16 important distinction. He accepts that the --
17 the evidence about the plea allocution or the
18 statement made in the plea allocution would most
19 certainly be relevant.

20 He says that Morris's plea allocution
21 is probative, but whether or not it's admissible
22 is a different question. All right? Whether
23 Morris possessed a 9-millimeter is a subject
24 that is in play, but the judge points out "As to
25 the manner in which that subject can be

1 presented, that may be a different question."

2 The judge acknowledges that the
3 statements in Morris's plea allocution would be
4 testimonial in nature under Crawford and would
5 present confrontation problems whether or not
6 they satisfy the hearsay exception.

7 And he continues, "The subject,
8 whether Morris possessed a 9-millimeter gun, is
9 relevant. Should there be a way of proving
10 that, meaning a way that comports with the
11 Confrontation Clause, that Morris was in
12 possession of a .357 and not a 9-millimeter,
13 that issue is relevant."

14 So, for example, if Morris were here
15 and he were able to testify and be called as a
16 witness, his testimony about which gun he
17 possessed would not be immaterial. He'd be
18 allowed to testify, and I would find it to be
19 probative.

20 "The problem," the judge says, "The
21 problem arises because you don't have
22 constitutional language in which to offer that
23 evidence." It's academic as to whether it's
24 relevant.

25 So I really feel that that tells you,

1 and when you read that, you must -- you
2 understand the judge understood this
3 distinction. And so, when he is invoking the
4 Reid decision, what he's saying is that there is
5 something misleading.

6 And he may -- he went -- you know, he
7 did he acknowledge that he thought that the
8 defense was doing something, I forget what the
9 language is, acceptable, but that's -- I don't
10 feel that that's because he thought that the --
11 I think that this -- the thing that he's finding
12 there is that he doesn't necessarily think that
13 the defense is behaving badly, but,
14 nevertheless, the jury is being misled.

15 JUSTICE BREYER: So how does -- how
16 does it work? Simple case, Smith is accused of
17 murder. Just Smith, who testifies, says, I
18 didn't do it, Jones did it. Jones did it. He
19 had the knife, he had the gun, and he had the
20 poison all ready, and I saw him with it.

21 Prosecutor: Well, unfortunately,
22 Jones is in Mongolia, but we would like to
23 introduce Jones' affidavit which he gave in our
24 local office known as the Star Chamber and we --
25 we would like to produce this.

1 Can he do it? New York?

2 MS. MIGNOLA: No. No, I don't think

3 he -- I don't --

4 JUSTICE BREYER: Why not?

5 MS. MIGNOLA: Because --

6 JUSTICE BREYER: And how does it

7 differ?

8 MS. MIGNOLA: -- it's not misleading.

9 I don't think there's anything --

10 JUSTICE BREYER: It's not misleading?

11 The prosecutor said -- I mean, the -- the person

12 said, I didn't do it.

13 MS. MIGNOLA: Yes. But I --

14 JUSTICE BREYER: Jones did it. What

15 could be more misleading?

16 MS. MIGNOLA: But I think -- I think

17 that that's not misleading to the jury, okay? I

18 think you have to understand that when the

19 defense attorney is making inferences, he's

20 relying on something that's out of bounds. And

21 that's what was going on here.

22 Again, if you -- well, I -- I see that

23 you -- you doubt what I'm saying there, Justice

24 Breyer.

25 JUSTICE BREYER: No, I'm not doubting

1 you. I just want you to explain it.

2 MS. MIGNOLA: Yes, you're hoping that
3 I'll explain it better.

4 JUSTICE BREYER: Yeah.

5 MS. MIGNOLA: But I think that the
6 part that is out of bounds is, again, this idea
7 that he was asking the jurors to rely on what
8 the government believed. But, at the time that
9 the government prosecuted Mr. Morris, that was,
10 you know, early days.

11 Later on, we believed something else.
12 Mr. Morris pled guilty to the conduct that the
13 government believed he was actually guilty of.
14 Again, in his opening statement, the defense
15 talks about the fact that the -- you know, the
16 Morris case must have been ended in a way that
17 was frustrating for the victims and the
18 families. He's leaving this speculation about
19 how that case ended.

20 JUSTICE ALITO: Was the -- was --

21 MS. MIGNOLA: Again, that was outside
22 the bounds and unfair. Yes, Justice?

23 JUSTICE ALITO: Was the
24 opening-the-door rule used here as a way of
25 counteracting statements and questions by

1 counsel that never should have been allowed?

2 MS. MIGNOLA: Well, that's always a
3 tricky question because I think judges are
4 inclined to give the defense a little elbow room
5 and to give -- rather than strike something once
6 it's happened, you know, the judge didn't
7 necessarily know how the defense was going to
8 give its opening or that he was going to include
9 these ideas, especially after he'd given such a
10 strong ruling before trial.

11 All right. So, once it happens, do
12 you want to cut his wings? Do you want to tell
13 the jury what happened, or do you want to say:
14 Look, what we're going to do is we're going to
15 allow these couple of lines of plea allocution
16 and, with it, we're going to introduce the
17 hearsay statements from Mr. Morris's attorney
18 that completely dilute and undercut and,
19 frankly, would have been the sum -- the -- what
20 the cross-examination and so-called
21 confrontation, what that would have really
22 looked like --

23 JUSTICE ALITO: But weren't there --

24 MS. MIGNOLA: -- which is --

25 JUSTICE ALITO: -- weren't there more

1 direct and -- and clearly proper ways of
2 counteracting these statements and these
3 questions? When the -- the defense suggested
4 that the Morris -- that the outcome of the
5 Morris case was somehow helpful to -- to him,
6 didn't that open the door for testimony about
7 what actually happened in the Morris case?

8 Or when the defense raised --
9 suggested that the police believed that somebody
10 else did the shooting, didn't that open the door
11 to testimony about further investigative steps?

12 Was this done the right way? That's
13 what I'm saying. Is this -- was the
14 opening-the-door rule -- I understand the trial
15 court doesn't want to -- doesn't want to strike
16 statements made in an opening. I understand
17 that. But is this being used as a sort of a
18 corrective that wasn't really necessary, if it
19 was attacked more directly?

20 MS. MIGNOLA: So I think that that was
21 part of the New York State standard, is that the
22 court should only admit those statements that
23 are reasonably necessary and that -- that it was
24 part of the judge's determination. So I do feel
25 that, you know, that's the way the judge sized

1 it up. He's using his discretion.

2 Look, in cases, for example, where a
3 defendant is disruptive in the courtroom, there
4 may be lots of alternatives, right? You can gag
5 him and bind him. You could delay the
6 proceedings. Courts have alternatives, but it's
7 really got to be up to the judge to weigh and
8 balance those alternatives to come up with the
9 thing that makes -- is the best fitting.

10 And what he did here, as I said, was
11 he not -- admitted not only the couple of lines
12 from Morris about what he did, but he -- the
13 judge also allowed the jurors to hear the
14 reasons that Morris took that plea. He pled --
15 pled guilty. He got out of jail right that day.
16 He only served a two-year sentence.

17 So, you know, they understood the --
18 the larger context. They understood some of the
19 information that would have been elicited, had
20 there been a right -- had there been a
21 confrontation or had there been
22 cross-examination on that point.

23 So he balanced it. So he crafted the
24 remedy that he thought fit the situation. You
25 might --

1 CHIEF JUSTICE ROBERTS: Haven't --

2 MS. MIGNOLA: -- have done something
3 different.

4 CHIEF JUSTICE ROBERTS: I'm sorry.
5 Haven't we said, though, in a situation that the
6 Constitution has already made the decision about
7 the way in which the evidence could be made more
8 reliable; in other words, you have to have the
9 confrontation?

10 MS. MIGNOLA: So, Mr. Chief Justice, I
11 think the critical distinction here is that that
12 is a rule that goes to when you're assessing
13 whether the procedural mechanism is a
14 substitute, a substitute basis for determining
15 reliability of evidence.

16 When the prosecution is saying, well,
17 we'd like to try to get this in through what we
18 all have recognized as hearsay exceptions,
19 right? Those are the exceptions when there's
20 another basis or -- and there's a dying
21 declaration or any of the other methods, we
22 think of when we think of hearsay exceptions,
23 right? Those are the exceptions.

24 This is not an exception. It's a
25 limitation. I think it's conceptually very

1 different, right? The trial court like you --
2 this Court has talked about in Taylor, this --
3 in the -- it is the -- the discretion to fashion
4 a remedy when the defendant transgresses a state
5 rule.

6 So, for example, in the context of the
7 constitutional provision, the defendant has the
8 right to compulsory process and to present
9 evidence. But if the defense transgresses a
10 rule that deals with discovery or notice, the
11 state can limit that right.

12 In Melendez-Diaz, this -- this Court
13 certainly talked about the fact that the state
14 could impose rules. For example, the state
15 could say, well, okay, we have a -- an analyst
16 who was prepared to certify the results of a
17 test. If you want to cross-examine and take
18 advantage -- exercise your right of
19 confrontation, please notify us.

20 If the defendant doesn't meet the
21 deadline, the defendant doesn't follow those
22 rules, he forfeits his right. The state can
23 craft rules that are designed or have a
24 legitimate purpose and that is to uphold the
25 integrity --

1 CHIEF JUSTICE ROBERTS: But those are
2 regular, normal procedural rules, you know, you
3 have to object and all this kind of things.
4 It's difficult, though, to -- to have procedures
5 that are intended to be substitutes for the
6 Confrontation -- Confrontation Clause. I mean,
7 you appreciate the fact that are two different,
8 what, equitable exceptions and procedural rules.

9 And what did the defendant do here
10 that was wrong and that could only be considered
11 a forfeiture of his constitutional right? Did
12 -- the judge himself said no, this was perfectly
13 appropriate.

14 MS. MIGNOLA: Well, I think that what
15 the judge is saying there is that he's not
16 faulting the lawyer, he understands why the
17 lawyer feels he needs to do -- go down this
18 path. Nevertheless, he understands that it's
19 misleading to the jury. And that's a
20 distinction.

21 So it -- it doesn't have to be that
22 the lawyer was ineffective or that he needs to
23 be punished in some way. It's that the --
24 still, the court's core duty is to make sure
25 that the jurors are not misled so that they can

1 do their job.

2 And that's part of what Taylor talks
3 about, right, is the duty of the court and the
4 important interests that the court has in
5 maintaining the integrity of its process. And
6 that's why these rules can be appropriate.

7 I would say that the rule of
8 completeness is right along with that. That's
9 where the rule of completeness gets its
10 authority from because the -- the -- otherwise,
11 if you don't have that, the jury can be misled.

12 And it's not that the judge is
13 deciding which portion of the statement is true
14 or if any of it's true. He's just saying that
15 the jurors can't be -- can't do their job and --
16 and decide what the statement means if they
17 don't have both portions of it.

18 JUSTICE GORSUCH: If -- if a --

19 MS. MIGNOLA: That's the misleading --

20 JUSTICE GORSUCH: If a judge can
21 insist on the introduction of -- of hearsay
22 based on his assessment that, otherwise, the
23 jury would be misled on the truth of the matter
24 at hand, why -- why does it matter whether the
25 defendant opens the door, in your parlance, or

1 not?

2 I mean, if -- if the truth-seeking
3 function is that important, and the
4 cross-examination right is that unimportant,
5 what does it matter whether the defendant opens
6 the door or closes the door, whether there's a
7 door at all?

8 MS. MIGNOLA: Well, I do think that
9 that's where there is a good balance because if
10 he's not opening the door, then, you know, it
11 shouldn't come in. If --

12 JUSTICE GORSUCH: But if -- if the
13 government's failed to produce something
14 important that the judge thinks without which,
15 you know, the jury is really not going to
16 understand just how bad a guy this guy really
17 is, you know?

18 MS. MIGNOLA: But I don't --

19 JUSTICE GORSUCH: I mean, why --

20 MS. MIGNOLA: Again, I feel that's --

21 JUSTICE GORSUCH: -- why not just --
22 what's -- what does a door have to do with
23 anything if it's all about the misleading of the
24 jury? I guess I'm still -- you could answer
25 that question.

1 MS. MIGNOLA: Right. I -- I -- I
2 appreciate what you're saying. I just think
3 that what is meant by misleading is much
4 narrower. Otherwise, you'd be seeing a
5 proliferation of cases where there would just be
6 no Confrontation Clause and everybody would say
7 it's -- it's contradictory or misleading
8 because --

9 JUSTICE GORSUCH: Exactly. Yeah.

10 MS. MIGNOLA: But it hasn't happened,
11 Judge -- it has not happened, Justice.

12 JUSTICE GORSUCH: I'm asking for a
13 limiting principle.

14 MS. MIGNOLA: The limiting principle,
15 yes, has to be that the -- what is misleading is
16 really about whether the jurors can fairly
17 evaluate the truth and --

18 JUSTICE GORSUCH: Isn't that always in
19 the eye of the beholder?

20 MS. MIGNOLA: Well, I think that
21 that's what the judge is, is the beholder. And
22 he's working --

23 JUSTICE GORSUCH: He's certainly a
24 beholder. We're certainly beholders. But
25 doesn't that suggest that it's something more

1 than a -- just a simple procedural rule?

2 MS. MIGNOLA: No, I don't think --

3 JUSTICE GORSUCH: Like you have to
4 file your brief in 30 days?

5 MS. MIGNOLA: I think it -- I think it
6 is a procedural rule. I think that it --

7 JUSTICE GORSUCH: One that depends --

8 MS. MIGNOLA: But I -- but I think
9 that --

10 JUSTICE GORSUCH: -- upon the eye of
11 the beholder?

12 MS. MIGNOLA: But that's what the
13 traditional rule of completeness is. That is
14 exactly the analysis principle --

15 JUSTICE GORSUCH: Well, I thought we
16 agreed the rule of completeness is different
17 because -- than this case because that's just,
18 you know, if you introduce half of a document,
19 the whole thing comes in.

20 MS. MIGNOLA: But then you have to ask
21 what is the conceptual basis for that.

22 JUSTICE GORSUCH: Exactly, and --

23 MS. MIGNOLA: And --

24 JUSTICE GORSUCH: -- and that's what
25 we've been talking about.

1 MS. MIGNOLA: And -- yes.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas? Justice Breyer, any further? Justice
5 Kagan? Justice Gorsuch? Justice Kavanaugh,
6 anything further?

7 JUSTICE KAVANAUGH: No further
8 questions.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal?

12 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

13 ON BEHALF OF THE PETITIONER

14 MR. FISHER: Thank you, Mr. Chief
15 Justice. I'd like to make one point on
16 preservation and then two points on the merits.

17 As to preservation, I take the -- the
18 tone of some of the Court's questioning today to
19 be imagining writing a decision that said that
20 it's not enough to simply put on evidence or
21 present a defense that can be contradicted by
22 testimonial hearsay to waive the confrontation
23 right or forfeit it. But we would leave for
24 another day whether the rule of completeness
25 might be different.

1 That is precisely the argument that we
2 made to the New York Court of Appeals at pages
3 380 -- 386 to 388. We said that if all that
4 triggers the introduction of the evidence is
5 that it's relevant to refute the defense, that
6 would violate the Sixth Amendment. So the exact
7 opinion that some of the justices have imagined
8 writing is exactly what we asked the New York
9 Court of Appeals to write and what it refused to
10 do and why we brought the case to this Court.

11 It's also well within the question
12 presented. Justice Alito, you asked about the
13 question presented, I think, and others have.
14 The question presented is whether or under what
15 circumstances a defendant forfeits the right in
16 the opening-the-door situation.

17 And so, yes, we make two alternative
18 arguments. We say the defendant can never open
19 the door. But from the beginning of the cert
20 petition on through our merits brief, we have --
21 we have made the narrower argument, that at
22 least when the evidence is merely relevant. And
23 that's the primary argument that we made in our
24 blue brief and that I'm making here today.

25 As to the merits, I want to say two

1 things. First is the State keeps putting gloss
2 on what state law requires as the sort of
3 misleading test. I would direct the Court to
4 New York law as in the Fardan case cited in our
5 blue brief, the -- that is described as saying
6 that the out-of-court evidence the state wishes
7 to introduce would contradict the defense. In
8 Massie in 2004, the New York Appeals said again
9 it would be directly contradictive to the
10 defense. At JA 184 of this case, the trial
11 judge said the prosecution's evidence would be
12 contrary to the defense.

13 Nothing more is required as a matter
14 of state law. The state opening-the-door
15 doctrine never talks about impropriety or
16 defines "misleading" in any other way than being
17 contrary to the defense.

18 And so that leads me to the second
19 point, which is the -- again, the further gloss
20 that co-counsel -- that my opposing counsel
21 wants to put on the New York decision below.

22 And, yes, there was a pretrial
23 colloquy about whether Mr. Hemphill could, as
24 she puts it, invite speculation from the jurors
25 about what happened in the Morris case. The

1 trial judge said, no, you can't. And then that
2 was the end of the matter in our pretrial
3 colloquy.

4 If anything in Mr. Hemphill's opening
5 or cross-examination or closing had been thought
6 by the prosecution to step over that line, the
7 prosecution could have objected and the trial
8 court could have reprimanded the -- the defense
9 counsel if that indeed stepped over the line.

10 The State never even objected to these
11 various statements. And if you look at the
12 joint appendix and I'd urge the Court to take
13 careful look at the joint appendix, if you have
14 any questions on this, that dispute over
15 improper speculation was entirely separate from
16 the decision to introduce Mr. Morris's
17 allocution. And I'll start where my friend
18 started, at JA-106 to 109.

19 The language she's describing about
20 Morris's allocution is rejecting the
21 prosecution's argument that the allocution is
22 not even testimonial. That's what the trial
23 judge is saying is that, wait a minute,
24 prosecution, this seems to be testimonial,
25 rejecting the prosecutor's argument that it's

1 admissible because it's non-testimonial so the
2 trial judge is recognizing, we may have a
3 confrontation problem here on our hands.

4 And then as the colloquy goes forward
5 in further -- in further conversation at JA-117
6 to 120, JA-139 to 141, the trial judge is again
7 saying, I see a possible confrontation problem
8 here. And the State's saying no, this is
9 relevant evidence to refute the defense. We
10 want to introduce it.

11 And then at JA-184 to 185, the trial
12 judge says, "Aha!" I have a way to let it in.
13 The prosecution didn't even think of this. The
14 trial judge said I have a way to let it in.
15 Under the Reid decision of the Court of Appeals,
16 we can say the defendant opened the door.

17 And that's where I started my argument
18 today was reading that ruling. It's at 184/185.
19 The trial judge says, look, I understand this
20 defense. It's an all respects appropriate. But
21 my friend keeps saying that the trial judge was
22 thinking maybe there was something
23 inappropriate. The trial judge expressly says,
24 your defense and arguments are in all respects
25 appropriate.

1 But, nonetheless, under Reid, they
2 opened the door because the testimonial hearsay
3 is contrary to the defense theory that Morris is
4 the shooter.

5 We ask the Court to hold that merely
6 making testimonial evidence relevant to
7 contradict the defense theory is not enough to
8 forfeit the Confrontation Clause rights. That
9 would establish an important principal of the
10 law, reassert the classic understanding of the
11 Confrontation Clause, tell the New York Court of
12 Appeals that it was wrong, at least in this kind
13 of a situation, that the -- that the right can
14 be forfeited and also resolve the circuit split
15 that we brought to the Court in our cert
16 petition.

17 If the Court has no further questions,
18 I'll submit the case.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 12:05 p.m., the case
22 was submitted.)

23

24

25

Official - Subject to Final Review

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